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No. 08-165

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TEJPAL SINGH,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Preliminary Statement	1
A. Respondent Incorrectly Argues That Petitioner Has "Conflated" Two Distinct Issues	1
B. There Was a Clear Abuse of Both Prosecutorial and Judicial Discretion	3
C. New York Law Does Not Preclude the Granting of Limited Use Immunity	5
Conclusion	6

TABLE OF CITED AUTHORITIES

Page

Cases:

Autrey v. McKaskle, 465 U.S. 1085 (1984) 3

Cortes v. County of Nassau, 248 A.D.2d 616, 670 N.Y.S.2d 509 (2nd Dept. 1998) 6

Hunter v. California, 498 U.S. 887 (1990) 3

Kastigar v. United States, 406 U.S. 441 (1972) ... 6

New Jersey v. Portash, 440 U.S. 450 (1979) 6

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) .. 3

People. v. Cabey, 85 N.Y.2d 417, 626 N.Y.S.2d 20 (1995) 4

People v. Osorio, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1st Dept.1982), *appeal dismissed*, 57 N.Y.2d 671, 454 N.Y.S.2d 77 (1982) 6

People v. Smith, 97 N.Y.2d 324, 740 N.Y.S.2d 279 (2002) 2

People v. Whatley, 69 N.Y.2d 784, 513 N.Y.S.2d 110 (1987) 4

Roviaro v. United States, 353 U.S. 53 (1957) ... 2

Cited Authorities

	Page
Taylor v. Illinois, 484 U.S. 400 (1988)	3
Webb v. Texas, 409 U.S. 95 (1972)	4
United States Constitution:	
Fifth Amendment	5, 6
Statute:	
New York Penal Law §§20.00 and 20.15	4
Rule:	
Supreme Court Rule 10(c)	2

Preliminary Statement

Petitioner Tejpal Singh respectfully submits this brief in reply to the Brief for Respondent ("Brief") which was submitted in opposition to his petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. To the extent that not all of Respondent's contentions are addressed herein, Petitioner submits that his principal petition adequately anticipated, and appropriately discussed, such remaining issues.

A. Respondent Incorrectly Argues That Petitioner Has "Conflated" Two Distinct Issues

Respondent contends that, below, Petitioner only challenged the prosecutor's denial of immunity and did not invoke the trial judge's inherent power to compel a grant. Thus, according to Respondent, because "Petitioner did not argue [before the Appellate Division and the New York Court of Appeals] that the trial court had the inherent authority to immunize the witness, independent of the prosecutor's decision[,]" Brief at 6, "petitioner conflates two separate issues, only one of which was properly raised in state court, and thus only one of which would be reviewable here." *Id.*, at 7.

As an obvious effort to manufacture a procedural bar to Supreme Court review, this contention incorrectly bifurcates one question into two. At trial, counsel initially requested that the prosecutor, who had refused to authorize the arrest of Amaprit Anu Singh, grant him immunity upon Anu's invocation of the Fifth

Amendment. Then, in the face of the prosecutor's refusal, counsel unsuccessfully moved the judge for a mistrial to *force the issue*.

There can be no question but that by so moving, Petitioner was invoking the inherent power of the court to remedy the prejudice created by the prosecutor's refusal to grant immunity. Surely, had the court complied, the prosecution would have had no choice but to succumb, at pains, ultimately, of forfeiting its case against Petitioner. *Cf. Roviaro v. United States*, 353 U.S. 53 (1957). Respondent's contention would render that follow-up application meaningless — a view wholly at odds with New York procedural jurisprudence. *People v. Smith*, 97 N.Y.2d 324, 740 N.Y.S.2d 279 (2002).

Having been thereafter unsuccessful in the Appellate Division on this point, Petitioner ultimately asked the Court of Appeals to grant a discretionary appeal. In the course of his application to New York's highest court, Petitioner traced that court's limited precedents, several of which dealt, not only with the issue of a prosecutor's refusal, but with the trial judge's authority, *vel non*, to compel a grant of immunity in order to vindicate a defendant's due process rights.

On this record, therefore, for all the reasons earlier stated, the question of both prosecutorial discretion *and* judicial authority are necessarily before this Court. Accordingly, as indicated in the principal petition, at p. 9, aside from the conflicts among the various circuits, this case presents "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). As Justice Marshall earlier

urged in *Autrey v. McKaskle*, 465 U.S. 1085, 1086 (Marshall, J., dissenting) "the proper standards for testing such claims" need to be addressed. *See also Hunter v. California*, 498 U.S. 887 (1990) (Marshall, J., dissenting).

Otherwise stated, the Court should grant this petition to finally explain the ramifications of its earlier statements in *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) and *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) that "[o]ur cases establish, at a minimum, that criminal Petitioners have the right to *the government's assistance in compelling the attendance of favorable witnesses at trial* and the right to put before a jury evidence that might influence the determination of guilt." Emphasis added. Query: does such "assistance" necessarily entail immunity grants, absent proper reasons not to do so?

B. There Was a Clear Abuse of Both Prosecutorial and Judicial Discretion

Contrary to Respondent's claim, the record presents an unambiguous opportunity for the Court to measure clear prosecutorial abuse. As explained in Petitioner's statement of the case, there was simply no cognizable evidentiary showing that there had been more than one shooter at the time of the incident. Rather, the testimonial and forensic proof demonstrated the presence of only one weapon firing .45 caliber casings at the scene — the same caliber bullet extracted from the deceased. The .38 caliber bullet found *inside* the residence next to the bloody shirt could *not* have been fired at the same time, since there was no one in the

residence at the time of the incident who could have accounted for the blood-stained shirt. Indeed, obviously confronted with this reality, the prosecution made no effort to connect the blood to anyone.

For this reason, this Court would certainly have a basis to determine on plenary review that the prosecutor acted improperly and arbitrarily in declining to grant immunity to Anu and that the judge improperly denied a mistrial. It simply cannot be ignored, as Respondent seeks to do, that this was the same prosecutor who had rejected former Detective Carroll's request to arrest and charge Anu, where, in turn, Anu was placed in the drive-by car by his own statements, thereby making him a knowing accomplice under New York law.[1] Indeed, Respondent also ignores that this was the same prosecutor who threatened the retired Detective Carroll with arrest were he to appear as a defense witness and thereby testify to what Anu had earlier stated to him.[2]

As Respondent itself notes, "all of the circuit courts that have been squarely confronted with the issue have articulated the same fundamental requirements for

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1. *See* New York Penal Law §§20.00 and 20.15. Surely, his statements "arguably revealed [Anu's] knowledge of and involvement in [the group's] plan as well as their collective objective." *People. v. Cabey*, 85 N.Y.2d 417, 421, 626 N.Y.S.2d 20 (1995) citing *People v. Whatley*, 69 N.Y.2d 784, 513 N.Y.S.2d 110 (1987).

2. Given that, absent his proposed testimony, there was no threat of arrest that would have been made against Carroll, this is precisely the type of unconstitutional heavy-handedness that was roundly condemned in *Webb v. Texas*, 409 U.S. 95 (1972).

compelling a prosecutor to grant immunity: a substantial showing of prosecutorial overreaching, often phrased in terms of a deliberate attempt to distort the fact-finding process *or to intimidate a witness*, and a showing of the defendant's need, usually including the clear exculpatory value of the testimony and the inability to obtain the testimony elsewhere." Brief at 16; emphasis added. Surely, this standard has been met on this record where the prosecutor, in the face of Anu's Fifth Amendment invocation, sought to intimidate the one witness who could have demonstrated Anu's own complicity, and where Anu would have unequivocally exculpated Petitioner by placing him outside of the vehicle.

C. New York Law Does Not Preclude the Granting of Limited Use Immunity

Finally, Respondent urges that the prosecutor could not have been expected to give transactional immunity to Anu, given legitimate concerns over Anu's own culpability. It is claimed that "Petitioner never argued in state court that the court or the prosecutor had the authority to confer use immunity." Brief at 24, n. 6. Petitioner first notes that Respondent is absolutely wrong: *The record will attest that Petitioner specifically asked the Court of Appeals to consider the use immunity issue in furtherance of avoiding any legitimate prosecutorial concerns regarding granting transactional immunity for Anu.*

In any event, even if — contrary to the record, as above discussed — there had existed a legitimate prosecutorial concern about maintaining the ability to

charge Anu, New York Criminal Procedure Law §50.10(1) — as Petitioner urged before the state courts — does not preclude the granting of use immunity. *See Cortes v. County of Nassau*, 248 A.D.2d 616, 617, 670 N.Y.S.2d 509 [2nd Dept. 1998]); *People v. Osorio*, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1st Dept.1982), *appeal dismissed*, 57 N.Y.2d 671, 454 N.Y.S.2d 77 (1982). This is especially so, here, where Anu specifically invoked the *Fifth Amendment*, with its implication of use immunity, rather than asserting a right to remain silent instead of securing statutory transactional immunity. Because the former is all the Constitution demands, *New Jersey v. Portash*, 440 U.S. 450, 457-58 (1979); *Kastigar v. United States*, 406 U.S. 441 (1972), contrary to Respondent's argument, that is all the prosecutor would have been required to bestow.

Conclusion

The Petition for a Writ of Certiorari Should Be Granted

Respectfully submitted,

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